No. 92-1229

Supreme Court, U.S.
FILED
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In The Supreme Court Of The United States

OCTOBER TERM, 1992

LEWIS R. LAW,
MINE MANAGEMENT, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED FOR REVIEW

In the absence of some affirmative act of causation, may mere ownership of the surface of land through which polluted waters flow constitute a criminal violation of federal law?

DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were the Petitioners, Lewis R. Law and Mine Management, Incorporated,[1/] and the Respondent, the United States of America. These were the parties before the court of original jurisdiction, the United States District Court for the Southern District of West Virginia.

[1/]Mine Management, Incorporated has no parent or subsidiary companies.

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OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals sought to be reviewed is reported as United States of America v. Lewis R. Law, 1992 U.S. App. LEXIS 24512 (4th Cir. 1992). It is reproduced in the Appendix, infra, at 1 - 13.[2/] An Order on Rehearing was issued by the court of appeals on October 21, 1992 and it is reproduced in the Appendix, infra, at 14 - 15.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals' judgment was entered on September 25, 1992. A petition for

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[2/]Originally, this opinion was unpublished. However, by Order issued November 9, 1992, the status of the opinion was changed from unpublished to published. It does not yet have a Federal Reporter citation.

rehearing and suggestion for rehearing in banc was timely filed. This petition was denied by Order of October 21, 1992. This petition for writ of certiorari is timely filed pursuant to Rules 13.1 and 13.4 of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

This matter involves the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1311(a), 1319(c)(2), 1342(a) and 1362(12) reproduced in the Appendix, infra, at 16 - 24.

STATEMENT OF THE CASE

Criminal prosecution was commenced against petitioners Mine Management, Incorporated ("MMI") and Lewis R. Law in 1991 for alleged felony violations of the Clean Water Act (the indictment is reproduced in the Appendix, infra, at 25 - 31). The statute under which the

indictment was brought is 33 U.S.C. § 1319(c). The specific offense charged was knowingly discharging pollutants into navigable waters of the United States from a point source without a National Pollution Discharge Elimination System ("NPDES") permit.

The property involved is 241 acres of land located at Summerlee, Fayette County, West Virginia. In 1930, the New River Coal Company ("New River"), a subsidiary of Chesapeake & Ohio Railway Company, commenced coal operations on the property and continued these operations for 50 years. These operations included a coal preparation plant as well as other activities incident to mining and resulted in considerable coal refuse which New River dumped into three hollows or valleys. Eventually, this resulted in

the amassing of a refuse pile covering 70 acres and being 100 feet deep.

In 1977 petitioner Law formed MMI which, despite its name, has never been an operating coal company and has never managed a mine. Rather, MMI was created as a vehicle to find and negotiate leases for operating companies.

Late in the 1970's, under pressure from the United States Environmental Protection Agency ("EPA") and the West Virginia Department of Natural Resources, New River was forced to begin treatment of water pollution. This treatment involved a runoff point, settlement ponds, a pump and the use of soda ash pellets to raise the pH level of the water.

In 1980, shortly after it was forced to begin water treatment, New River closed its coal preparation plant and

began to look for buyers. The petitioners were interested in purchasing the surface of the property for future development of a mobile home park, a scenic railroad, the restoration and preservation of an old company store as a historic landmark, and recovery and reprocessing of coal refuse and fines previously deposited about the surface of the property.

Thus, in the spring of 1980, petitioners negotiated with New River and ultimately purchased the surface only of the 241 acres by deed dated April 1, 1980.

Prior to the sale, by letter of August 10, 1976, the EPA advised New River that it was responsible for the water pollution, as long as the pollution continued to be discharged. (Reproduced in the Appendix, infra, at 32 - 33.)

However, almost immediately upon the petitioners' acquisition of the surface, and despite the EPA's earlier warning that New River was still responsible for cleaning up the pollution it had generated for 50 years, the state regulatory authorities began to insist that MMI was now required to clean up the mess even though it was only the surface owner and was not an operating coal mining company.

Although petitioners did not and do not now dispute the fact that waters running through the property are polluted within the meaning of the statutes and regulations involved, the petitioners are not responsible and have committed no crime because petitioners did not do anything to cause additional discharges.

Nevertheless, petitioners were convicted and petitioner Law was fined

$80,000 and sentenced to two years incarceration which he is currently serving.

REASONS FOR ALLOWANCE OF THE WRIT

This case warrants review because the Court of Appeals opinion has misconstrued applicable legal principles and material facts with respect to the application of the relevant provisions of the Clear Water Act. Under the statute by which petitioners were prosecuted, the concept of "discharging pollutants" has been misconstrued and misapplied by the Court of Appeals.

Specifically, the decision is contrary to and in conflict with decisions in the Fourth, Sixth and District of Columbia Circuits[3/] holding

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[3/] See Nat'l Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th

(continued...)

that "discharge of a pollutant" means the actual "addition" of a pollutant. By the contrary decision below, the Court of Appeals thwarts due process by permitting criminal felony convictions for alleged pollution violations of petitioners who discharged no pollutants whatsoever. The decision, if allowed to stand, imposes liability upon any property owner over whose property polluted water flows through no fault of his own. Thus, all landowners are potentially placed in a Catch-22 situation: either expend large sums of money to clean up pollution which they had no part in causing or be held criminally liable and face incarceration.

[3/](...continued)
Cir. 1988), Nat'l Wildlife Federal v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) and Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976).

Therefore, the requested writ must issue to afford this Court the opportunity to correct the error below.

In relevant part, 33 U.S.C. § 1362(12) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." (Emphasis supplied.) In construing this statute, the Court of Appeals overlooked and misapprehended not only material facts but also solidly established principles of criminal law.

It is fundamental to criminal jurisprudence that some action be proved before criminal responsibility may be properly imposed. Powell v. Texas, 392 U.S. 514 (1968). In fact, as Justice Marshall observed, "one eminent authority has found only one isolated instance, in all of Anglo-American jurisprudence, in which criminal responsibility was imposed

in the absence of any act at all." Id. at 543.

Here, the facts and evidence establish that the stream in issue was already polluted at the time it flowed onto petitioners' property and that petitioners did not cause the addition of any further pollutants into the stream.

Leroy Gilbert, an environmental inspector with the West Virginia Division of Natural Resources and a government witness, admitted at trial that the pollution situation already existed when petitioners purchased the property, and that the petitioners had not done anything to cause additional discharges. (Reproduced in Appendix, infra, at 34.) Additionally, witness Faykus testified that he had engaged in mining on a mountain above petitioners' property and had encountered considerable reddish-

colored water at elevations 200 to 300 feet above petitioners' property. (Reproduced in Appendix, infra, at 35 - 37.) And, Dr. George A. Hall, a Ph.D. in geotechnical engineering who had personally visited petitioners' property and the adjacent properties, testified that the pollution originating on the adjacent property actually generates the headwaters of Wolf and Arbuckle Creeks and, therefore, the streams are polluted at their source before they ever reach petitioners' property. (Reproduced in Appendix, infra, at 38 - 39.)

As a consequence of overlooking these facts, the Court of Appeals thereby misapprehended the application and interpretation of the statutory and case law.

Several cases, including Nat'l Wildlife Federation v. Consumers Power

Co., 862 F.2d 580 (6th Cir. 1988), Nat'l Wildlife Federal v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) and Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976), precisely illustrate that in order for petitioners to be criminally responsible, they must be found to have added a pollutant to the waters of the United States, and they are not liable for the discharge of pollutants that were already in the water.

In fact, the Court of Appeals' ruling is directly contrary to Fourth Circuit precedent that:

> [T]he Act prohibits only the addition of any pollutant to navigable waters from a point source [and that] those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.

(Emphasis Supplied.) Train, 545 F.2d at 1377. Further, it is relevant to note that this specific Train holding was cited by the District of Columbia Circuit in Gorsuch for the proposition that "[w]ithout causation, there is no legal responsibility for removing pollution from the water." 693 F.2d at 174, n.57.

Clearly, this is the law in the Fourth Circuit. In fact, the Court of Appeals has acknowledged as much in this case in ruling that the trial court's instruction that "[i]t is not a defense . . . that some, or all, of the pollutants . . . originated at places not on the defendants' property" was in error, albeit allegedly harmless. Law, at 6-7.

Additionally, the law set forth in Train and Gorsuch is consistent with elementary principles of criminal law as

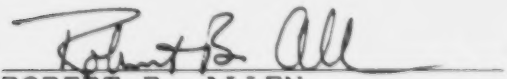
enunciated and explained by this Court in Powell, supra. Therefore, these convictions warrant review by the Court and should be vacated.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT B. KING



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEWIS R. LAW,
MINE MANAGEMENT, INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

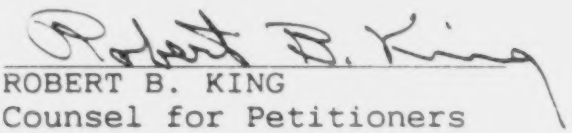
I, ROBERT B. KING, counsel for Petitioners, hereby certify, pursuant to Rules 29.3, 29.4(a) and 29.5 of the Supreme Court Rules, that copies of the foregoing **Petition for Writ of Certiorari** have been served upon the United States of America by mailing three copies on the 19th day of January, 1993, in envelopes with first class postage prepaid in the

regular course of the United States mail addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and

Michael W. Carey
United States Attorney
P. O. Box 3234
Charleston, WV 25332



ROBERT B. KING
Counsel for Petitioners

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 92-5075

LEWIS R. LAW,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 92-5076

MINE MANAGEMENT, INCORPORATED,

Defendant-Appellant.

Appeals from the United States
District Court for the Southern
District of West Virginia, at Beckley.
Elizabeth V. Hallanan, District Judge
(CR-91-225)

Argued: June 4, 1992

Decided: September 25, 1992

Amended November 9, 1992. Released for
Publication November 9, 1992.

Before HALL and PHILLIPS, Circuit Judges
and BUTZNER, Senior Circuit Judge

Affirmed by published per curiam opinion.

COUNSEL

ARGUED: Victor Alfred Barone, HURT & BARONE, Charleston, West Virginia, for Appellants. Sanford Benjamin Bryant, Assistant United States Attorney, Charleston, West Virginia, for Appellee. ON BRIEF: Charles E. Hurt, HURT & BARONE, Charleston, West Virginia, for Appellants. Michael W. Carey, United States Attorney, Phillip B. Scott, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

OPINION

PER CURIAM:

Lewis R. Law and Mine Management, Inc. appeal their felony convictions for violating the Clean Water Act, 33 U.S.C. § 1319(c)(2) ("CWA") by knowingly discharging polluted water into Wolf and Arbuckle Creeks in Fayette County, West Virginia without a National Pollution

Discharge Elimination System ("NPDES") permit. Finding no reversible error, we affirm.

I

In 1977 Lewis R. Law formed Mine Management, Inc. ("MMI"), a West Virginia corporation, to engage in various coal-related business activities. From MMI's inception, Law was its sole officer and stockholder. In 1980, MMI purchases 241 acres from the New River Company ("New River"). The conveyance included an aged coal preparation plant, masses of coal refuse ("gob piles"), and a water treatment system. New River installed this system in the late 1970s to collect, divert, treat, and discharge runoff and leachate from a gob pile that covered a large portion of the subject property.

The water treatment system was designed to reduce the acidity and metal

content of drainage from the gob pile. The system comprised a collection pond near Wolf Creek, a pump, and piping that channeled the collected water over a ridge and through a hopper, which dispensed soda ash briquettes to raise the pH of the water. Iron and manganese then precipitated out as the water flowed through two settling ponds before its discharge into Arbuckle Creek.

The water treatment system was subject to an NPDES permit when MMI purchased the site. Despite repeated notice, however, neither MMI nor Law ever applied for, or was granted, an NPDES permit authorizing discharges into Wolf or Arbuckle Creeks. Due to MMI's failure to operate the water treatment system effectively, acid mine drainage discharged from the collection pond into Wolf Creek, or from the second settling

pond into Arbuckle Creek, on at least 16 occasions between March, 1987 and November 15, 1991. Law and MMI were indicted for violating the CWA, 33 U.S.C. § 1319(c)(2), tried to a jury, and found guilty. Law was sentenced to two years in prison and Law and MMI were fined $80,000.00 each.

II

Law and MMI challenge their convictions on two grounds. They argue, first, that the trial court instructed the jury erroneously on the law governing their case and, second, that the court abused its discretion in barring evidence regarding New River's alleged policy of concealing preexisting environmental problems from prospective purchasers of its property. We reject both grounds of appeal.

A

Under the CWA, it is a felony to (a) knowingly (b) discharge (c) a pollutant (d) from a point source (e) into a navigable water of the United States (f) without, or in violation of, an NPDES permit. See 33 U.S.C. §§ 1131(a), 1319(c)(2), 1342(a); Arkansas v. Oklahoma, 112 S. Ct. 1046, 1054 (1992); see also 33 U.S.C. § 1362(12) (defining "discharge" as "any addition of any pollutant to navigable waters from any point source") (emphases added). Appellants do not contest that they added untreated acid mine drainage to Wolf and Arbuckle Creeks from the collection pond and the settling pond, respectively, knowing that they lacked the requisite NPDES permit.

In challenging the trial court's jury instructions, however, appellants

contend that the CWA imposes liability only upon the generators of pollutants discharged into navigable waters of the United States, and not upon persons over whose property preexisting pollutants are passed along to flow finally into navigable waters. They contend that the trial court erred by refusing to instruct the jury that no responsibility lies for discharging pollutants that originate beyond one's own property,* and by instructing the jury instead that

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*/Defendants' Instructions 9A, 10, and 14 would have required the jury to find liability only if defendants were shown to generate the pollutants at issue. Defendants' Instructions No. 11A, 12, and 13 would have required the jury to find that defendants, as owners solely of the property's surface, had no duty to treat waters contaminated by the property's subsurface. Defendants' Instruction 15, which was omitted from the Joint Appendix, apparently tracked Instructions 11A, 12, and 13. See Appellants' Brief at 32.

> . . . it is not a defense to the charge that the water discharged from the point source came from some other place or places before its discharge from the point source. It is not a defense to this action that some, or all, of the pollutants discharged from a point source originated at places not on the defendants' property. This is because the offense consists of the knowing discharge of a pollutant from a point source into a water of the United States [without, or in violation of, an NPDES permit]. J App 489-90

Appellants rely for this contention upon decisions in National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988), National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), and Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976). In these cases, operators of power plants and dams diverted, then released, navigable waters of the Untied States. The appellate courts held that

where "pollutants" existed in the waters of the United States before contact with these facilities, the mere diversion in the flow of the waters did not constitute "additions" of pollutants to the waters. Consumers Power, 862 F.2d at 585-86; Gorsuch, 693 F.2d at 174-75; Train, 545 F.2d at 1377-78. Appellants sought to square their case with these decisions by showing that the headwaters of Wolf and Arbuckle Creeks originated, and were polluted, before entering their water treatment system, so that, like the power plant and dam operators, they had no duty to remove preexisting pollutants.

With respect to pollutants preexisting in the waters of the United States, where the flow of the waters is merely diverted, the trial court's jury instructions did not state the law with strict accuracy ("[i]t is not a defense

. . . that some, or all, of the pollutants . . . originated at places not on the defendants' property"). The error was harmless, however, because, as a matter of law, appellants' water treatment system was not part of the waters of the United States; to the contrary, the system constituted a point source.

Unlike the river and lake waters diverted in Consumers Power, Gorsuch, and Train, appellants' water treatment system collected runoff and leachate subject to an NPDES permit under the CWA, and therefore was not part of the "waters of the United States." See 40 C.F.R. 122.2(g) ("Waste treatment systems, including treatment ponds and lagoons designed to meet the requirements of CWA . . . are not waters of the United States."). The origin of pollutants in

the treatment and collection ponds is therefore irrelevant. The proper focus is upon the discharge from the ponds into Wolf and Arbuckle Creeks.

Appellants' treatment system is also unlike the power plants and dams at issue in Consumers Power, Gorsuch, and Train because it clearly satisfies the statutory definition of "point source." See 40 C.F.R. 122.2 (a "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . conduit, . . . discrete fissure, . . . [or] landfill leachate collection system . . . from which pollutants are or may be discharged" (emphasis added); "discharge" includes "surface runoff which is collected or channelled by man"); see also Sierra Club v. Abston Constr. Co., 620 F.2d 41, 47 (5th Cir. 1980)

(collection and channelling of runoff constitutes a point source). Because appellants' treatment system was, as a matter of law, not part of the waters of the United States but instead a point source, the trial court's instructions to the jury were without prejudicial error.

B

Appellants also claim that the trial court abused its discretion in excluding evidence concerning New River's alleged policy of concealing existing environmental problems from prospective purchasers. Under the foregoing analysis of the CWA, the relevant mens rea issue was Law's knowledge as of March, 1987, that the ponds were discharging pollutants into the creeks without, or in violation of, an NPDES permit. Appellants' attempts to cross-examine former New River employees Louis

Briguglio and Don Reedy regarding the alleged policy were therefore properly excluded as irrelevant. Law's testimony regarding his conversations with Briguglio were properly excluded as hearsay.

III

For the foregoing reasons, we affirm the convictions of Lewis R. Law and Mine Management, Inc. on all counts.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 21, 1992

No. 92-5075

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LEWIS R. LAW

Defendant - Appellant

No. 92-5076

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MINE MANAGEMENT, INCORPORATED

Defendant - Appellant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellants filed a petition for rehearing with suggestion for rehearing

in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Phillips, with the concurrence of Judge Hall and Senior Judge Butzner.

For the Court,

/s/ Bert M. Montague

CLERK

33 U.S.C. § 1311(a). **Effluent limitations**

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(c). **Enforcement**

* * *

(2) **Knowing violations**

Any person who –

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly

owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph,

punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

33 U.S.C. § 1342(a). **National pollutant discharge elimination system**

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to

assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title,

and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period

which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
JULY 24 1991, GRAND JURY SESSION 90-2
CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:91-00225-02
33 U.S.C. § 1319(C)(2)

LEWIS R. LAW
MINE MANAGEMENT, INC.

I N D I C T M E N T

The Grand Jury Charges:

INTRODUCTION

At all times material to this indictment:

1. Defendant **MINE MANAGEMENT, INC.** was a corporation incorporated under the laws of the State of West Virginia.

2. Defendant **LEWIS R. LAW** was the President of **MINE MANAGEMENT, INC.**, and controlled the business affairs of **MINE MANAGEMENT, INC.**.

3. In approximately April or May, 1980 **MINE MANAGEMENT, INC.** purchased the surface rights to a tract of land of approximately 241 acres located at Summerlee, Fayette County, West Virginia. A coal refuse pile, also known as a gob pile, was, and still is, located on the property, covering approximately 20 acres of ground. Water collects in and around the coal refuse pile. The water, as a result of percolating through the coal refuse pile, becomes very acidic, and contains high concentrations of iron and manganese. The acid water then discharges, or leaches, out of the coal refuse pile. Prior to the purchase by **MINE MANAGEMENT, INC.** of the property in 1980, acid water discharges from the coal refuse pile were treated by a treatment system comprised of a series of settlement/treatment ponds, which

included a pump, which was used to neutralize the acid in the water and to remove iron and manganese from the water, before the water was finally discharged into Arbuckle Creek.

4. Since 1980 and continuing to the present, on numerous and frequent occasions, defendants **LEWIS R. LAW** and **MINE MANAGEMENT, INC.** have knowingly failed to maintain and operate the existing treatment system and thereby caused, and allowed the discharge of pollutants, that is, acid water containing high levels of iron and manganese, into Arbuckle Creek and into Wolf Creek, tributaries of the New River. Defendants **LEWIS R. LAW** and **MINE MANAGEMENT, INC.** have knowingly caused and allowed discharge of these pollutants in the following ways: (1) failing to operate the treatment system described

above; (2) failing to chemically treat the acid water discharges from the coal refuse pile; (3) failing to operate and maintain a pump necessary for the treatment system to operate effectively; and (4) failing to properly and adequately maintain the impoundment surrounding the coal refuse pile. As a result of defendants' actions and failures to act, acid water containing iron and manganese has, and continues, to discharge into the headwaters of Wolf Creek and Arbuckle Creek.

5. The acid water containing high levels of iron and manganese described above is a pollutant within the meaning of the Federal Clean Water Act, 33 U.S.C. § 1362(6).

6. Wolf Creek and Arbuckle Creek are navigable waters of the United States

within the meaning of the Federal Clean Water Act, 33 U.S.C. § 1362(7).

7. Under the Federal Clean Water Act, it is illegal to discharge a pollutant into a water of the United States either without, or in violation of the terms of, a National Pollution Discharge Elimination System (NPDES) permit issued by the United States or a State. 33 U.S.C. §§ 1311(a) and 1342.

8. Defendants **LEWIS R. LAW** and **MINE MANAGEMENT, INC.** never obtained a National Pollution Discharge Elimination System permit authorizing the discharge of acid water containing high levels of iron and manganese, or any other pollutant, into Wolf Creek or Arbuckle Creek.

9. On or about the dates set forth below, at or near Summerlee, Fayette County, West Virginia, and within the

Southern District of West Virginia, defendants **LEWIS R. LAW** and **MINE MANAGEMENT, INC.** knowingly discharged pollutants, that is, acid water with a pH level less than or equal to 4.0 and containing high levels of iron and/or manganese, from point sources, into navigable waters of the United States, as set forth below, that is, Wolf Creek and/or Arbuckle Creek, without a National Pollution Discharge Elimination System Permit, in violation of Title 33, United States Code, Sections 1311 and 1342 as follows;

ALL IN VIOLATION OF TITLE 33, UNITED STATES CODE, SECTION 1319 (c)(2).

Count	Date	Stream
One	March 5, 1987	Wolf Creek
Two	March 5, 1987	Arbuckle Creek
Three	July 6, 1987	Arbuckle Creek
Four	October 28, 1987	Wolf Creek

Five	January 26, 1988	Wolf Creek
Six	January 26, 1988	Arbuckle Creek
Seven	January 16, 1990	Wolf Creek
Eight	January 16, 1990	Arbuckle Creek
Nine	April 9, 1990	Wolf Creek
Ten	April 9, 1990	Arbuckle Creek
Eleven	July 24, 1990	Wolf Creek
Twelve	July 24, 1990	Arbuckle Creek
Thirteen	November 28, 1990	Wolf Creek
Fourteen	January 30, 1991	Wolf Creek
Fifteen	January 30, 1991	Arbuckle Creek
Sixteen	April 11, 1991	Wolf Creek
Seventeen	May 31, 1991	Wolf Creek
Eighteen	May 31, 1991	Arbuckle Creek

A True Bill.

_____
Foreperson

MICHAEL W. CAREY
United States Attorney

By: _____
Assistant United States Attorney

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

REGION III
6th AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

August 10, 1976

Mr. Donald M. Reedy
Vice President
Planning and Development
The New River Company
Lock Drawer No. 711
Mount Hope, West Virginia 25880

Dear Mr. Reedy:

In reference to your letter dated July 27, 1976, we have checked our records to see whether the permit No. WV 0000493 has been issued. Our records definitely show that the permit was issued to your Company on June 30, 1976. We have a receipt indicating that your Company received the permit. As long as your Company is in operation and discharging,

you are required to have a permit. Once you stop discharging and the facility shuts down, then you would no longer require a permit. You would then be required to submit a letter of cancellation informing us that the Company is no longer discharging.

Enclosed is a copy of the permit and Discharge Monitoring Reports. If I may be of further assistance please feel free to contact me at (215) 597-9902.

Sincerely yours,

Lawrence H. Benning, P.E.
Chief, West Virginia
Industrial Section
Enforcement Division

Joint App., Vol. 1, pp. 169-170; Excerpts of Trial Transcript

Q Did Mine Management ever do anything that precipitated any water discharge from that property?

A The discharge was there when they purchased the property.

Q Right. Did they ever do anything that caused any discharge of water from the property?

A Additional discharges?

Q Yes.

A No, sir.

Joint App., Vol. 1, pp. 246-247; Excerpts of Trial Transcript

Q All right. Now, while you were working in that area, did you find any auger holes?

A On the south side -- I think it would be the south side. I ain't got a map, so, but it was on the side of the mine, the mine and the company store and all that. It was on that side right there. So, to me, that would be on the south side.

Q That's the side that would face down upon this gob pile I'm talking about?

A Right.

Q All right. And can you tell us what you found in those auger holes?

A Water.

Q And what was the surface around those auger holes? What did it look like?

A It was -- well, we had to brush the bottom seam, which, where the deep mines and the auger holes were to put our dirt that we were stripping off the upper seam. That's where the dirt went. And where there was so much water flowage and mud down there, we just, you know, it was almost impossible to clean up. But that was the reason for, to put the dirt, you know, on the lower seam to reclaim it.

Q All right. But where the water came out of these old auger holes, what color was the ground?

A Red, had a red tint ever where the water flowed.

Q And how far above this particular gob pile was that?

A I'm going to say three hundred feet, two hundred.

Q All right, sir, thank you.

Joint App., Vol. 2, p. 290; Excerpts of Trial Transcript

Q And would you say that five hundred fifteen parts per million of iron in that water is worse than 2.17 parts per million?

A Yes. But, here again, as I say, the water above would definitely be diluted during wet weather conditions by surface water which seeps down those two hollows.

Q Okay, I must have misunderstood your testimony. I thought you said that the water above that was tested by Esmer & Associates was probably the source of this water in the pond and that the pile had no effect on it. Is that, was that not your opinion?

A My opinion is that the water which is causing the pollution is

originating from the acid mine drainage above and is actually the water which generates the head waters of these two streams which come under the refuse pile and that they are polluted at their source before they ever reach the property or the coal refuse pile.

FILING AND MAILING CERTIFICATE

I hereby certify that on this 19th day of January, 1993, I filed via certified mail 40 copies of a Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required three (3) copies to Solicitor General, Department of Justice, Washington, D.C. 20530 and Michael W. Carey, United States Attorney, P.O. Box 3234, Charleston, WV 25332.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

Lawyers Printing Company
Suite B-115
7th & Franklin Building
Richmond, Virginia 23219